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# In the Supreme Court of the United States

STATE OF MINNESOTA, PETITIONER

*v.*

JAMES A. ALLEN, RESPONDENT

**On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota**

## BRIEF FOR THE PROSECUTING ATTORNEYS OF SPOKANE AND KING COUNTIES, WASHINGTON, AND THE STATES OF ALASKA, LOUISIANA, MONTANA, NEVADA, OREGON, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

In States that define presumptive sentences but allow for upward departures, does the Sixth Amendment require that offender characteristics warranting departure, such as unamenability to probation, be found by a jury or admitted by the defendant?

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## INTERESTS OF *AMICI CURIAE*

The States have exercised their traditional prerogatives to create and implement criminal justice procedures by experimenting with different approaches to criminal sentencing.[1] As the Court has recognized, criminal sentencing in the early Republic—"when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square"—consisted in application of prison sentences "prescribed with specificity by the legislature." *United States* v. *Grayson*, 438 U.S. 41, 45 (1978). By the late nineteenth century, however, a different approach to criminal sentencing had emerged. Reflecting the view that rehabilitation of the offender was the most important goal of punishment, state and federal sentencing courts were given broad discretion to impose appropriate sentences in light of all the relevant facts, and parole officials were given similar discretion to determine when a prisoner should be released. See *id.* at 46. The new emphasis on rehabilitation meant that criminal sentences should be tailored to the offender as well as the offense.

In 1949, this Court endorsed New York's rehabilitative approach to sentencing, whereby a sentencing court was authorized to "consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities." *Williams* v. *New York*, 337 U.S. 241, 245 (1949). Rejecting a due process challenge to such judicial factfinding, the Court held that a sentencing court's determination of the appropriate sentence for a particular offender should not be handicapped by "rigid adherence to

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

restrictive rules of evidence properly applicable to the trial." *Id.* at 247. New York's approach to sentencing "emphasize[d] a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime," and this Court confirmed that the Constitution permitted New York to choose that "modern philosophy" as its guide. *Ibid.*

"Serious disparities in sentences" were "common" under indeterminate sentencing regimes. *Mistretta* v. *United States*, 488 U.S. 361, 365 (1989). At the same time, "[r]ehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases." *Ibid.* Consequently, States and the federal government in the past thirty years have adopted more structured sentencing regimes focused on offense-based, rather than offender-based, factors. For example, the sentencing regime at issue in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), imposed a mandatory minimum sentence based on the sentencing court's finding that the defendant "visibly possessed a firearm" during the commission of the offense, without regard for any offender-specific circumstances.

Just as New York and Pennsylvania adopted different approaches to criminal sentencing in 1949 and 1986, the States today continue to experiment with approaches to sentencing that vary in the degrees to which they permit offender-specific decision-making. Of course, any State's sentencing regime must comply with constitutional limitations, and one such limitation is that a sentencing court may not increase a defendant's sentence beyond that which would be available "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004).

It is not clear, however, whether this rule also applies to judge-found facts that relate solely to the *offender* rather than to the *offense*. Some state courts have held that *Blakely* is not

applicable to offender-specific facts (such as possibility of rehabilitation and likelihood of recidivism), while other state courts have held that *Blakely* forbids *any* increase in the severity of the sentence based on judge-found facts, whether those facts relate to the offender or the offense.

So long as States continue to experiment with different types of structured sentencing frameworks—which they have wide latitude to do—the degree to which courts may consider offender-specific facts remains a crucial issue. And by *Blakely*'s own terms, it is not clear that jury fact-finding is necessary to assess offender characteristics.

*Amici* therefore support Minnesota's request that the Court clear up the confusion and hold definitively that *Blakely* has no application to such offender-specific facts. The Sixth Amendment does not require a jury trial for determination of such facts, and the States must retain the latitude to fashion sentencing regimes that permit some consideration of offender-specific circumstances, even in the context of structured sentencing.

## STATEMENT

In 1978, Minnesota's legislature enacted a statute creating a Sentencing Guidelines Commission charged with crafting new sentencing guidelines. See *State* v. *Shattuck*, 704 N.W.2d 131, 138 (Minn. 2005). "The Sentencing Guidelines promulgated by the Commission employ a grid to determine the presumptive sentence[s] for felonies. The vertical axis of the grid represents the severity of the offense and is arrayed into 11 severity levels. The horizontal axis represents the defendant's criminal history score, comprised of prior convictions, applicable juvenile record, and custody status at the time of the current offense. A bold line on the grid demarcates those offenses for which the presumptive sentence is executed from those for which the presumptive sentence is stayed." *Id.* at 139 (citations omitted).

The sentencing guidelines provide that the sentencing court "shall utilize the presumptive sentence" unless compelling circumstances warrant a departure, and the court in *Shattuck* held that "imposition of the presumptive sentence is mandatory absent additional findings." *Id.* at 139, 141. A sentencing court must make written findings of fact supporting any decision to depart from a presumptive sentence. *Id.* at 138-139. Appellate review is available to determine whether a particular sentence is "inconsistent with statutory requirements, unreasonable, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the [sentencing] court." *Id.* at 139 (quotations omitted).

Respondent was arrested for driving under the influence of alcohol and ultimately pled guilty to a single felony count of first-degree test refusal. First-degree test refusal is a form of first-degree driving while impaired, which is a level 7 offense under Minnesota's sentencing guidelines. This offense level, combined with the fact that Respondent was on probation at the time of the offense, yielded a presumptive sentence of 42 months stayed.

At sentencing, however, the trial court made an additional finding that "[b]ased on [Respondent's] numerous prior alcohol-related convictions and his history of absconding from probation, * * * [Respondent] was not amenable to probation." *Minnesota* v. *Allen*, 706 N.W.2d 40, 43 (Minn. 2005). Based on this finding, the sentencing court departed from the presumptive sentence and sentenced Respondent to an *executed* term of 42 months' imprisonment.

Respondent challenged the sentence on appeal, arguing that such a departure is impermissible under this Court's decision in *Blakely*. The Supreme Court of Minnesota previously had held that upward *durational* departures—increasing the length of the prison term—are unconstitutional under *Blakely* to the extent they are based on the sentencing court's finding that the crime involved an

aggravating factor. *Shattuck*, 704 N.W.2d at 142-143. In this case, the court applied the same reasoning to *dispositional* departures, noting that "sentence disposition * * * is as much an element of the presumptive sentence as sentence duration." 706 N.W.2d at 45. Thus, the court held that "when the [sentencing] court found that [Respondent] was unamenable to probation, and on that basis executed his presumptively stayed sentence, it violated [Respondent's] Sixth Amendment right to have a jury make that determination using a reasonable-doubt standard." *Id.* at 47.

## SUMMARY OF ARGUMENT

The Court should grant Minnesota's petition to resolve an issue of significant importance to all the States that allow upward departures from presumptive sentences: whether *Blakely* forbids a sentencing court to depart from a presumptive sentence based on offender-specific facts such as likelihood of recidivism, susceptibility to rehabilitation, or amenability to probation. In concluding that *Blakely* forbids *any* upward departure from a presumptive sentence based on judge-found facts, the decision below conflicts with this Court's decisions as well as decisions from the highest courts of several other States. The Court should resolve those conflicts by holding that *Blakely* applies only to facts that relate to the offense itself.

## ARGUMENT

### I. Whether The Sixth Amendment Permits Upward Departures From Presumptive Sentences Based On Offender-Specific Facts Is A Question Of Nationwide Importance.

The resolution of the question presented in this case will have a significant impact on structured sentencing throughout the States. Many States have structured sentencing regimes that guide courts' decisions in meting out appropriate criminal punishments. The structure in these regimes seeks to ensure a rough uniformity in sentencing for

similarly-situated offenders. But structure is not ironclad rigidity, and many States' sentencing regimes, like Minnesota's, authorize departures from presumptive sentences where aggravating or mitigating circumstances warrant. Such provisions reflect the traditional understanding that sentencing courts should "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon* v. *United States*, 518 U.S. 81, 113 (1996).

Several commentators have observed that the decision in *Blakely* potentially affected existing sentencing regimes in as many as twenty States. See Douglas A. Berman, *The Roots and Realities of* Blakely, 19 Crim. Just. 5, 12 (Winter 2005); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 104 Colum. L. Rev. 1082, 1087 (2005); Vera Inst. of Justice: State Sentencing & Corrections, *Aggravated Sentencing:* Blakely *v.* Washington—*Practical Implications for State Sentencing Systems* 3 (Aug. 2004). When *Blakely* was decided, thirteen States had presumptive sentencing regimes that were "fundamentally affected" by the decision in *Blakely*. Vera Inst., *supra*, at 3 (Alaska, Arizona, California, Colorado, Indiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, and Washington). Six more States had voluntary sentencing regimes that required the sentencing court to begin with the presumptive sentence but do not require imposition of that sentence. *Ibid.* (Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia). Two States, Michigan and Pennsylvania, had indeterminate sentencing regimes that might still be affected by *Blakely* insofar as sentencing guidelines limit the court's discretion in setting the minimum term for any particular sentence. Vera Inst., *supra*, at 3, 5-6.

*Blakely* sparked various legislative reform proposals, but only a handful of States have actually enacted amendments